

## SILENT SACRIFICES: THE IMPACT OF “DON’T ASK, DON’T TELL” ON LESBIAN AND GAY MILITARY FAMILIES

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### INTRODUCTION

The image of the heroes’ homecoming for those returning from war has become quintessential Americana. We see it in the famous World War II photograph of a sailor’s celebratory kiss with a nurse, as well as in the photographs of homecoming parades after the Korean War, the Vietnam War, and the first Persian Gulf War. Every day, we see poignant images of family members and friends, holding signs of endearment and pride, anxiously scanning the crowd for their loved one returning home from Iraq or Afghanistan as the ship docks or as the plane lands. We see husbands and wives hugging and kissing. We see children clinging tightly to their newly returned mother or father for fear of losing them to another deployment abroad. It is in the very public sphere of the homecoming that we celebrate and honor our nation’s military members. Yet, not everyone is included in these joyous moments. Under the “Don’t Ask, Don’t Tell” law banning open service, lesbian, gay, and bisexual<sup>1</sup> service members cannot celebrate and reunite with their loved ones in such a public space without fear of losing their job. Because of the ban on gays in the military, the sacrifices of these service members and their families are relatively unknown.

Imagine the life of the gay service member. Imagine hesitating every time a fellow service member asks about weekend plans. Imagine not being able to commit legally to your partner without fear of losing your career. Imagine not being able to enroll the child you adopted with your same-sex partner on your

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The Servicemembers Legal Defense Network is a national, non-profit legal services, watchdog, and policy organization dedicated to ending discrimination against and harassment of military personnel affected by “Don’t Ask, Don’t Tell” and related forms of intolerance. For more information, visit <http://www.sldn.org>.

The Authors are grateful for research assistance provided by Adam Banks, Sara Jeruss, and Fredo Silva at Yale Law School, and Stephen Lessard and Mischere Kawas at Georgetown University Law Center. The Authors offer special thanks to SLDN’s Director of Communications, Steve Ralls, for providing edits and additional feedback.

1. Whenever “gay” is used throughout this report, it is used as an all-inclusive term for lesbian, gay, and bisexual. The term “transgender” is not included because the language of the “Don’t Ask, Don’t Tell” law and its implementing regulations do not specifically refer to transgender service members. However, it is worth noting that “Don’t Ask, Don’t Tell” has been applied to transgender service members self-identifying as gay, and the law has also been misapplied to transgender service members who are incorrectly perceived to be gay.

health care plan without fear of discovery. Imagine not being able to name your same-sex partner as a recipient on your life insurance without inviting scrutiny. Imagine not being able to have a picture of your family on your desk at work. The simplest, seemingly innocent act can spell discharge for the gay service member; their service mandates the sacrifice of silence.

Every day, the men and women of the United States armed forces make countless sacrifices in service to our nation, from constantly moving across the globe, to missing the birth of a child, to the ultimate sacrifice of giving one's life for freedom. These sacrifices are well known, as are the hardships and heartaches of those on the home front—at least, the hardships of heterosexual service members. The sacrifices of the nation's 65,000 lesbian, gay, and bisexual military personnel<sup>2</sup> and the one million lesbian, gay, and, bisexual veterans, however, have only recently garnered significant attention.<sup>3</sup> Media stories such as that of former Army Sergeant Bleu Copas, an Arabic linguist with the 82nd Airborne, illustrate the impact of the "Don't Ask, Don't Tell" law on individual service members as well as the law's impact on the military's personnel needs.<sup>4</sup>

Yet the impact of "Don't Ask, Don't Tell" on gay military families has garnered little public attention because few families headed by a same-sex couple, in which one partner is currently serving in the armed forces, are willing to risk a career-ending move to tell their story, let alone face the loss of familial privacy by making such a public statement. The stories of gay military families in this article represent unexplored territory for not only the American public, but also for most advocates of family law. "Don't Ask, Don't Tell" affects more than just the 65,000 gay military personnel currently serving, or the one million gay veterans who have served; it also impacts—emotionally, financially, and legally—the lives of the partners and children of gay service members.

It is time to hear their stories.

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In Part I, we provide a brief overview of the "Don't Ask, Don't Tell" law, defining the law and providing some historical context. In Part II, we discuss three benefit areas available to service members and their families: medical, pay and housing allowances, and insurance survivor benefits. We underscore the negative ramifications for gay service members who wish to utilize those benefits in an effort to provide for and protect their families.

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2. See GARY J. GATES, THE URBAN INSTITUTE, *GAY MEN AND LESBIANS IN THE U.S. MILITARY: ESTIMATES FROM CENSUS 2000*, at iii (2004), [http://www.urban.org/UploadedPDF/411069\\_GayLesbianMilitary.pdf](http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf). It is very difficult to determine accurately the number of lesbian, gay, and bisexual service members in the United States Armed Forces. Survey access to military personnel is limited, and the "Don't Ask, Don't Tell" law prevents gay service members from giving honest answers regarding their sexual orientation. Using a widely accepted statistical procedure called the Bayes' Rule, the Urban Institute extrapolated the number of gay, lesbian, and bisexual service members from Census 2000 data. See *id.* at 1–3 (discussing methodology).

3. *Id.* at iii–iv.

4. E.g., Associated Press, *Gay Policy in Military Is Called Tool of Vengeance*, N.Y. TIMES, July 28, 2006, at A24; Oliver Burkeman, *Email Rumours Forced Gay Sergeant Out of US Army*, GUARDIAN (London), July 28, 2006, at 23; Jake Tapper & Scott McCartney, *Arabic Speaker Discharged for Being Gay*, ABC NEWS, Aug. 6, 2006, <http://www.abcnews.go.com/GMA/story?id=2274124&page=1>; Editorial, *Gay Service Members Deserve Fair Treatment*, HONOLULU ADVERTISER, Aug. 16, 2006, at 16A.

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In Part III, we review the legal landscape around the recognition of same-sex relationships, and in Part IV we examine employee benefits in the context of those states and local municipalities that recognize same-sex relationships. In Part V, we highlight the personal stories of two retired gay service members who faced a critical crossroads in their military careers when marriage became legal in Massachusetts: Would they obtain legal recognition for their relationships and face dismissal under “Don’t Ask, Don’t Tell” or would they continue to serve in silence?

Next, in Part VI, we discuss the legal landscape around same-sex couples adopting children—either jointly or as second-parents—by reviewing several cases involving dependent benefits for an adopted child. Following that legal discussion, we examine the personal stories of two gay military families with adopted children and the risks they faced under the ban on gay military personnel.

In Part VIII, we provide a quick overview of the growing momentum, both in Congress and in the courts, to repeal “Don’t Ask, Don’t Tell.” In Part IX, we point out how repeal of “Don’t Ask, Don’t Tell” might impact dependent benefits as it pertains to gay military families. Finally, in concluding, we reiterate how “Don’t Ask, Don’t Tell” undermines both national security, as well as the fundamental premise that, in the United States, all are equal.

## I. “DON’T ASK, DON’T TELL” DEFINED

In the early 1990s, when then-candidate Bill Clinton was campaigning to become President of the United States, he proposed ending the Department of Defense regulations banning gays serving in the military via an Executive Order. Upon becoming president, however, Clinton could not implement his plan due to objections by Congress and some military leaders. Following Congress’s intervention, the existing regulatory ban was made statutory law (with a few minor changes). This law, known as “Don’t Ask, Don’t Tell,” is a ban on lesbians, gays, and bisexuals serving in the military and is nearly identical to the regulations banning such service that had been in place for the previous fifty years.<sup>5</sup> “Don’t Ask, Don’t Tell” is truly unique in the American legal canon: No other federal, state, or local law mandates that individuals *must* be fired simply for being gay.

“Don’t Ask, Don’t Tell” lays out three grounds under which service members can be investigated and discharged for homosexual conduct: (1) a statement that they are lesbian, gay, or bisexual; (2) engaging in physical contact with someone of the same sex for the purposes of sexual gratification; or (3)

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5. See 10 U.S.C. § 654 (2000) (codifying “Don’t Ask, Don’t Tell”); see also Dep’t of Defense Directive No. 1332.14, Enlisted Administrative Separations, at encl.3 ¶ E3.A1.1.8.1.1 (1994) [hereinafter DoDD 1332.14] available at <http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf>; Dep’t of Defense Instr. 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers, at encl. 2 ¶ E2.3 (1997) [hereinafter DoDI 1332.40], available at <http://www.dtic.mil/whs/directives/corres/pdf/133240p.pdf>; cf. Dep’t of Defense Instr. 5505.8, Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations, at §§ 4, 6, & encl. 2 (2005), available at [http://www.dtic.mil/whs/directives/corres/pdf/i55058\\_012405/i55058p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/i55058_012405/i55058p.pdf).

marriage, or attempted marriage, to someone of the same sex.<sup>6</sup> The implementation of this law over the past thirteen years has resulted in a fairly strict application of these definitions. In practice, any statement of homosexual orientation by a service member, public or private, has resulted in investigation and discharge. Similarly, service members have been investigated and discharged from the military for such innocent acts as holding hands with someone of the same sex or having their arm around the shoulders of another person of the same sex.<sup>7</sup> It is, therefore, not a stretch to imagine that, while state and local government recognition of same-sex relationships is in its nascent stages, the military will likely lean toward equally strict application of “Don’t Ask, Don’t Tell” when issues concerning gay families arise.

## II. MILITARY FAMILY BENEFITS

More gay service members are seeking to avail themselves of the growing legal protections outside of the military for their relationships and families. This trend raises risks for these service members in a number of ways. First, through whatever manner their adult intimate relationships are recognized, be it marriage, civil union, or domestic partnership, that legal recognition itself is a public record that is evidence of homosexual conduct under “Don’t Ask, Don’t Tell.”<sup>8</sup> Second, service members with children, whether biological or through adoption, are obligated by regulation to notify the military that they have dependents.<sup>9</sup> Failure to report this dependent status to the military is punishable under Article 92 (Failure to Obey Order or Regulation) of the Uniform Code of Military Justice (UCMJ).<sup>10</sup> Such paperwork is itself a risk. The forms required to “prove” that a child is the dependent of a service member and the paperwork

6. 10 U.S.C. § 654(b)(1)–(3); DoDD 1332.14, *supra* note 5, at encl. 3 ¶ E3.A1.1.8.1.1 (“A member’s sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . .”); DoDI 1332.40, *supra* note 5, at encl. 2 ¶ E2.3 (same); DoDD 1332.14, *supra* note 5, at encl. 2 ¶ E2.1.7 (defining “homosexual conduct” as “[a] homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage); DoDI 1332.40, *supra* note 5, at encl. 1 ¶ E1.1.12 (same).

7. See John Stossel, *Why Doesn’t Uncle Sam Want These Troops?*, ABC NEWS, April 15, 2005, <http://abcnews.go.com/2020/GiveMeABreak/story?id=673844&page=1> (“Justin Peacock was thrown out of the Coast Guard after another soldier reported that he had been holding hands with another man.”); STACEY L. SOBEL, JEFFERY M. CLEGHORN & C. DIXON OSBURN, SERVICEMEMBERS LEGAL DEFENSE NETWORK, CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON “DON’T ASK, DON’T TELL, DON’T PURSUE, DON’T HARASS” 56 (2001), available at [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/256.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/256.pdf) (Investigation into conduct of a female lieutenant included the question: “In the last five years, have you held hands in public with an adult female who was not a relative? If, so how many times?”).

8. See *supra* note 6 and accompanying text.

9. See Dep’t of Defense Instr. 7730.19, Reporting of Dependents of Active Duty Military Personnel and U.S. Citizen Employees, ¶ 4 (1988), available at <http://www.dtic.mil/whs/directives/corres/pdf/773019p.pdf>; Dep’t of Defense Instr. 1342.19, Family Care Plans, ¶ 4.7 (1992), available at <http://www.dtic.mil/whs/directives/corres/pdf/134219p.pdf>.

10. 10 U.S.C. § 892 (2000) (codifying Uniform Code of Military Justice, Article 92); see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, Art. 92, ¶ 16(e)(1) (2005) [hereinafter MCM] (providing commentary and implementation guidance for Article 92 of the Uniform Code of Military Justice), available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

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required to ensure care for the child when a service member is deployed or otherwise unable to care for the child raises the risk of revealing a “Don’t Ask, Don’t Tell” violation.<sup>11</sup> This risk is heightened in military families where a gay service member has adopted the child as a second parent or jointly. An adoption certificate listing both parents with same-sex names will almost certainly raise the specter of a homosexual statement under “Don’t Ask, Don’t Tell.”<sup>12</sup> As these areas of law progress, gay service members are beginning to face situations where they are “damned if they do, and damned if they don’t,” as evidenced by the illustrative stories in this Article.

The United States military branches are federal agencies, and as such, they provide benefits to the family members of their employees—the soldiers, sailors, airmen, Marines, and coast guardsmen who protect our country. For the purposes of this Article, we focus on three primary benefit areas: medical, pay and housing allowances, and insurance survivor benefits. Key to obtaining many of these benefits is enrollment in the Defense Enrollment Eligibility Reporting System (DEERS). DEERS is a computerized database of service members (known as sponsors), their minor dependents, and their spouses.<sup>13</sup> The DEERS database is used to confirm the eligibility for those individuals applying for and receiving benefits through the military as dependents of U.S. service members. The dependents of military personnel who are entitled to be enrolled in DEERS include lawful spouses, some former spouses, unmarried children under the age of twenty-one, and parents or children residing with the service member who receive over fifty percent of their support from the service member.<sup>14</sup>

We begin our brief overview of benefits with a quick look at dependent medical benefits and eligibility. All members of the United States military and their dependents receive medical care through a regionally managed health care program called TRICARE.<sup>15</sup> Service members and their dependents are entitled to complete medical care through the TRICARE system, including general health, dental, optical, and chiropractic care. Much of this medical care occurs in military medical facilities, usually on a military installation. Again, in order for the dependents of service members to receive this medical coverage they must be enrolled in DEERS.

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11. In light of the federal Defense of Marriage Act, 1 U.S.C. § 7 (2000) (establishing a federal definition of “marriage” as limited to one man and one woman), it is presumed that the military will not recognize Massachusetts same-sex marriages for the purpose of designating a same-sex spouse as a dependent in DEERS.

12. See DoDD 1332.14, *supra* note 5, at encl. 3 ¶ E3.A1.1.8.1.1; DoDI 1332.40, *supra* note 5, at encl. 2 ¶ E2.3.

13. See Dep’t of Defense Instr. 1341.2, Defense Enrollment Eligibility Reporting System (DEERS) Procedures, at ¶ 4 (1999), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/134102p.pdf>.

14. Dep’t of Defense Instr. 1000.13, Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals, at encl. 4 ¶ E4.A1.1 (1997), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/100013p.pdf>.

15. Dep’t of Defense Instr. 6010.21, TRICARE Marketing Policy, at ¶ 3.3 (2001), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/601021p.pdf>.

In addition to medical benefits, service members who are married or have children are also entitled to pay and housing allowances that differ from single service members without children. In general terms, service members receive additional pay if they have dependents. Furthermore, service members receive additional housing allowance, if the government is not providing them with housing, based on their dependency status.<sup>16</sup> To provide some idea of the amounts at issue here, an E-1, the most junior enlisted rank, would receive a housing allowance of \$295.20 without dependents, but \$527.10 with dependents.<sup>17</sup> Another benefit included in this arena is Family Separation Allowance (FSA). Service members with dependents who are serving overseas, without their families, may be entitled to receive \$250 per month under FSA.<sup>18</sup> In order to receive this money, the service members must have dependents registered with DEERS and government housing must not be available to those dependents.<sup>19</sup>

Finally, we turn to the issue of insurance survivor benefits. The reality of serving in the military is that the likelihood of dying earlier than anticipated is much greater than for most other jobs. To address this reality, the military offers its members access to two insurance programs. First, service members may protect the financial security of their loved ones while they are serving through Servicemembers' Group Life Insurance (SGLI).<sup>20</sup> SGLI coverage is automatic for service members and they are allowed to name anyone they want as a beneficiary of this insurance upon their death.<sup>21</sup> Second, service members may protect the long-term financial security of their families by enrolling their dependents in the Survivor Benefit Plan (SBP).<sup>22</sup> SBP is an insurance plan that pays a monthly annuity to the surviving spouse or child of a service member to help compensate for the loss of retirement income if a service member dies. When a service member dies, the service member's retirement pay stops unless the service member has enrolled a spouse or child in this program. Those eligible for enrollment include the service member's spouse, former spouse, children, or persons who have an insurable interest with the service member (such as a business partner or co-property owner).<sup>23</sup> It is important to note at this juncture that, although a gay service member's partner does not necessarily meet the definition of spouse—we will discuss same-sex marriage later in this

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16. See Dep't of Defense Financial Management Regulation (FMR) 7000.14-R, Volume 7A: Military Pay Policy and Procedures—Active Duty and Reserve Pay, § 2601 (Sept. 2006) [hereinafter DoD 7000.14-R FMR], available at [http://www.dod.mil/comptroller/fmr/07a/07a\\_26.pdf](http://www.dod.mil/comptroller/fmr/07a/07a_26.pdf).

17. See Defense Finance and Accounting Service, Military Pay: 2007 Military Pay Charts, at 3, [http://www.dod.mil/dfas/militarypay/2006militarypaytables/2007\\_Web\\_Pay\\_Table.pdf](http://www.dod.mil/dfas/militarypay/2006militarypaytables/2007_Web_Pay_Table.pdf) (last visited Mar. 17, 2007).

18. *Id.*

19. DoD 7000.14-R FMR, *supra* note 16, at ¶ 260301.A.

20. 38 U.S.C. §§ 1965–1980A (2000).

21. See 38 U.S.C. §§ 1967, 1970 (2000). Service members are covered up to \$400,000. *Id.* at § 1967. Service members may also enroll their spouses for individual coverage under SGLI up to \$100,000 and dependent children for coverage up to \$10,000. *Id.*

22. 10 U.S.C. §§ 1447–1455 (2000)

23. *Id.* at § 1448

article—that partner very well may meet the definition of someone with an insurable interest connection to the service member.

Almost all service members in the U.S. military with dependents avail themselves of some or all of these benefits to assist their families and to protect the future health and financial security of their loved ones. The reality is that gay service members, like their heterosexual counterparts, have significant relationships and families. Gay service members who want to protect their loved ones or same-sex partners face significant risks under “Don’t Ask, Don’t Tell” if they choose to apply for these benefits. We now examine these benefit areas in light of the military’s application of “Don’t Ask, Don’t Tell” and the growing movement by state and local governments to legally recognize same-sex relationships and families.

### III. SAME-SEX RELATIONSHIP RECOGNITION: THE LEGAL LANDSCAPE

Over the last several decades, government sanctioning or recognition of same-sex relationships has evolved significantly. Numerous foreign countries allow same-sex couples to marry, and even more nations legally recognize same-sex relationships by equalizing their status to that of opposite-sex relationships without the title of marriage.<sup>24</sup> For the purposes of this Article, we focus on the recognition of same-sex relationships by state and local governments within the United States. Prior to that discussion, we first acknowledge that the federal government explicitly denies legal recognition of same-sex relationships through the Defense of Marriage Act (DOMA), which became law in 1996.<sup>25</sup> DOMA defines “marriage” as “only a legal union between one man and one woman as husband and wife,” and grants authority to the states in deciding whether or not they will recognize marriage between persons of the same sex performed in another state.<sup>26</sup> In this article, we have taken DOMA out of the analysis simply because *many gay service members take it out of their analysis* when they are weighing the risks versus rewards of taking steps to protect their relationships and families. We do, however, suggest that despite DOMA’s existence, there is a growing tension concerning how same-sex relationships are to be treated as more state and municipal governments seek to recognize such relationships and grant spouse-like rights, benefits, and obligations.

In assessing how gay service members are impacted by these issues, we begin by giving a brief overview of the states which recognize same-sex relationships in some manner. Currently, seven states plus the District of Columbia either allow same-sex couples to marry, or recognize same-sex

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24. For a discussion of same-sex marriage abroad, see Anjuli Willis McReynolds, Comment, *What International Experience Can Tell U.S. Courts About Same-sex Marriage*, 53 UCLA L. REV. 1073 (2006) (comparing relevant laws and statistics from the Netherlands, Belgium, South Africa, and Canada with the U.S.), and Allison R. O’Neill, Note, *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice’s Ability to Dictate Social Policy*, 37 CORNELL INT’L L.J. 199 (2004) (describing the history of same-sex marriage legislation on a global scale with citations to legal documents from various countries).

25. Pub. L. No. 104-199, 110 Stat. 2419 (Sept. 21, 1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)).

26. 1 U.S.C. § 7; 28 U.S.C. § 1738C.

relationships in a manner conferring legal rights and benefits similar to marriage.<sup>27</sup> Massachusetts, as of the writing of this article, is the only state that permits same-sex couples to marry. In 2003, the Supreme Judicial Court of Massachusetts ruled that denying marriage to gay and lesbian couples violates the equality and liberty guarantees of the state Constitution.<sup>28</sup> Since that decision, the state of Massachusetts has allowed same-sex couples to get married as long as they meet standard state requirements for marriage.<sup>29</sup> The six other states plus the District of Columbia that do not permit marriage, but which legally recognize same-sex relationships, fall into two basic categories, those with civil unions (or their equivalent) and those with domestic partnership registries (or their equivalent).<sup>30</sup>

Connecticut, New Jersey, and Vermont allow same-sex couples to enter into civil unions.<sup>31</sup> Vermont and New Jersey enacted civil union laws after the highest-ranking courts in their states ruled that denying same-sex couples the benefits and responsibilities of marriage violated their respective constitutions.<sup>32</sup> Vermont's civil union statute provides that same-sex couples are to be provided the "same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."<sup>33</sup> In December 2006, New Jersey Governor Jon Corzine signed into law a statute that grants same-sex couples all of the rights and responsibilities of married opposite-sex

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27. See Human Rights Campaign, Relationship Recognition in the U.S. (Jan. 2007), <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=26860&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (listing California, Connecticut, Hawai'i, Maine, Massachusetts, and Vermont as states that provide some form of legal rights to same-sex couples) (last visited Mar. 17, 2007) [hereinafter HRC, Relationship Recognition in the U.S.].

28. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Legislature's failure to extend civil marriage to same-sex couples violated the Massachusetts Constitution's equal protection guarantees; giving the Massachusetts Legislature 180 days to enact same-sex civil marriage); see also *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (responding to question from Massachusetts Senate regarding the permissibility of same-sex civil unions in lieu of same-sex civil marriage; holding that the same state constitutional infirmities lay with permitting only same-sex civil unions as with failing to permit same-sex civil marriage).

29. One standard requirement that has remained at issue is the residency requirement. Massachusetts state government officials are currently refusing to allow residents from other states to be married in Massachusetts if their home state will not legally recognize their marriage. This blanket denial is being legally challenged. The Superior Court of Massachusetts ruled in September 2006 that same-sex residents of the state of Rhode Island could legally marry in Massachusetts since there are no laws in Rhode Island explicitly forbidding such marriages. See *Cote-Whitacre v. Dep't of Pub. Health*, No. 04-2656, 2006 WL 3208758 (Mass. Super. Ct. Sept. 29, 2006), *on remand from* 844 N.E.2d 623 (Mass. 2006).

30. See HRC, Relationship Recognition in the U.S., *supra* note 27.

31. See *id.*

32. See *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that, under the Vermont Constitution, same-sex couples could not be denied the civil benefits and obligations of marriage, regardless of what the resulting legal arrangement was called); *Lewis v. Harris*, 908 A.2d 196, 211-21 (N.J. 2006) (noting that, in light of the general equal-protection guarantees of the New Jersey Constitution and the state's history of positive treatment of homosexuals, the interest of same-sex couples in receiving the benefits of marriage outweighed the state's interest in denying same-sex couples these benefits).

33. VT. STAT. ANN. tit. 15, § 1204(a) (2007).



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couples.<sup>34</sup> Connecticut enacted a law in April 2005 providing for civil unions, granting same-sex couples all of the benefits, protections, and responsibilities of marriage extended to opposite-sex couples.<sup>35</sup>

California, the District of Columbia, Hawaii, and Maine provide for the registration of domestic partnerships. In very general terms, California intends for its domestic partnership registry to provide rights, benefits and responsibilities to same-sex couples that are similar to opposite-sex married couples.<sup>36</sup> The registries in the District of Columbia, Hawaii, and Maine, all of which are established through a series of laws, are much less expansive.<sup>37</sup> Indeed, Hawaii's law specifically states that same-sex couples "shall not have the same rights and obligations under law that are conferred through marriage . . .".<sup>38</sup> Regardless of the differences, however, the reality exists that more and more states are taking action to legally recognize same-sex relationships and granting both rights and responsibilities to same-sex couples similar or equal to those of opposite-sex married couples.

As state legislatures and local municipalities have begun to legally recognize same-sex relationships, case law linked to conferring benefits to same-sex couples is developing in the civilian judicial system. The case law concerning entitlement to benefits by same-sex couples generally breaks down into two basic types of cases. The first type is those cases where the courts are equalizing benefits for same-sex couples with those granted to opposite-sex couples. The second type is those cases where the courts are upholding benefits for same-sex couples that are already being provided. Even in states that explicitly prohibit marriage, courts are recognizing the legitimacy of same-sex relationships and conferring benefits such as access to family health insurance.<sup>39</sup> Courts often are ruling in favor of same-sex couples under the analysis that those couples cannot meet the marriage requirement for most benefits programs. These cases usually occur in the context of municipalities granting benefits to same-sex couples similar or equal to benefits provided to opposite-sex couples.<sup>40</sup>

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34. N.J. STAT. ANN. § 37:1-28 (West 2007) (effective Feb. 19, 2007).

35. See An Act Concerning Civil Unions, 2005 Conn. Acts 05-10.

36. See CAL. FAM. CODE § 297.5(a) (West 2004).

37. See D.C. CODE §§ 1-612.31-32, 16-2701, 21-2210, 32-501,704,705,706, 42-1102 (2004). See also 1997 Haw. Sess. Laws 383; HAW. REV. STAT. §§ 79, 83, 87, 88, 105, 171, 209, 247, 306,323, 324, 327, 334, 386, 388, 398, 431, 432, 443B, 453, 509, 516, 560, 586, 663, 706, 707, 708, 709, 801D (2004); ME. REV. STAT. tit. 18-A, § 2-102 (2004); ME. REV. STAT. tit. 22, §§ 2843, 2846 (2004).

38. See HAW. REV. STAT. § 572C-6 (2005)

39. See Alaska Civil Liberties Union v. State, 122 P.3d 781 (Alaska 2005); Snetsinger v. Mont. Univ. Sys., 104 P.3d 445 (Mont. 2004); *but see* Nat'l Pride at Work v. Gov. of Mich., No. 265870, 2007 Mich. App. LEXIS 240 (Mich. Ct. App., Feb. 1, 2007) (holding that the Michigan "Marriage Amendment," MICH. CONST. art. I, § 25, prohibits public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits).

40. See Crawford v. City of Chi., 710 N.E.2d 91 (Ill. App. Ct. 1999); Devlin v. City of Phila., 862 A.2d 1234 (Pa. 2004); Lowe v. Broward County, 766 So.2d 1199 (Fla. Dist. Ct. App. 2000).

## IV. SAME-SEX RELATIONSHIPS AND EMPLOYEE BENEFITS

Most cases involving courts' efforts to equalize benefits for same-sex couples with those given to opposite-sex couples center on the issue of public entities granting benefits only to opposite-sex couples. In the case of *Alaska Civil Liberties Union v. State*, the benefits at issue were those provided by the State of Alaska and the Municipality of Anchorage to the spouses of their employees.<sup>41</sup> The Supreme Court of Alaska held that, because the Alaska constitution restricts marriage to opposite-sex couples, the limitation of benefits to only spouses was unconstitutional as applied to public employees in same-sex relationships. The Court ruled that, since Alaska's Constitution also guarantees all citizens equal rights and opportunities, same-sex couples were being denied equal opportunities because they could not marry under state law and therefore could not meet the spousal limitation placed on the benefits given to state and local employees.<sup>42</sup>

Similarly, in the cases of *Bedford v. New Hampshire Community Technical College System* and *Snetsinger v. Montana University System*, the courts concluded that denying spousal benefits to same-sex couples was unlawful.<sup>43</sup> In *Bedford*, the court held that a spousal requirement for conferring benefits constituted unlawful employment discrimination on the basis of sexual orientation.<sup>44</sup> The *Snetsinger* court held that allowing opposite-sex unmarried couples to obtain benefits through filing an affidavit regarding their relationship, while denying the same opportunity to same-sex couples, was a violation of the state constitution's equal protection clause.<sup>45</sup>

The second set of benefit cases primarily involves counties and municipalities that already offer benefits to both opposite-sex and same-sex couples. Often these cases are brought by plaintiffs arguing that, when county and municipal governments offer benefits to their employees in same-sex relationships, these governments are seeking to create a new "marital status" for those couples.<sup>46</sup> This argument was made and discounted in the cases of *Crawford v. City of Chicago* and *Devlin v. City of Philadelphia*, where state appellate courts upheld the right of both cities to offer benefits to same-sex couples and denied that such an offer equates to changing state marriage laws.<sup>47</sup> In the case of *Lowe v. Broward County*, the Florida appellate court upheld a county's domestic partnership act which provides benefits to same-sex couples.<sup>48</sup> The court found that the act, as supported by legislative history, allowed the "county to compete with companies in the private sector" in order to attract the most qualified employees.<sup>49</sup> This concept is being raised more often with respect to the

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41. 122 P.3d 781 (Alaska 2005).

42. *Id.* at 785.

43. *Bedford*, 98 Fair Empl. Prac.Cas. (BNA) 663 (N.H. Super. Ct., 2006); *Snetsinger*, 104 P.3d 445 (Mont. 2004)

44. *Bedford*, 98 Fair Empl. Prac. Cas. at 668.

45. 104 P.3d at 453.

46. *Devlin v. City of Phila.*, 862 A.2d 1234, 1238 (Pa. 2004).

47. *Crawford*, 710 N.E.2d 91 (Ill. App. Ct. 1999); *Devlin*, 862 A.2d 1234.

48. 766 So.2d 1199 (Fla. Dist. Ct. App. 2000).

49. *Id.* at 1202, 1206.

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military's firing of gay service members. Furthermore, although these courts struck down the premise that a new marital status was created, they upheld the legitimacy of same-sex relationships for the conferral of benefits.<sup>50</sup>

The case law relevant to conferring spouse-like benefits in the military arena is, at this point, restricted to opposite-sex couples and usually in the context of Survivor Benefit Plan (SBP) benefits. The federal courts have put forward a fairly strict construction that proof of marriage is a necessary requirement for conferring these benefits, sometimes citing the desire to "avoid the placement of undue administrative burdens on private insurance carriers" in light of disputes over what a service member intended in naming a beneficiary.<sup>51</sup> Disputes often arise because SBP lists a hierarchy of beneficiaries to be followed in dispersing benefits upon the service member's death. In these SBP cases, a court's determination that a marriage to a service member is valid has been integral in upholding conveyance of benefits.<sup>52</sup>

## V. LOVE AND MARRIAGE: PERSONAL STORIES

On May 17, 2004, when marriage became legal for same-sex couples in Massachusetts, Army Staff Sergeant Jeffrey Schmalz and his partner of five years, Andrew Pollock, were in Provincetown watching others get married. As they watched other same-sex couples joyously getting married, they talked about their own desire to marry and the impact of their getting married on Schmalz's twenty-five-year Army career. Ultimately, they decided that if Schmalz "was not good enough for the military, [then he] would get out."<sup>53</sup> Schmalz put in his paperwork for retirement and on October 16, 2004, shortly after his retirement from the Army was finalized, Schmalz married his partner. Had he remained in the military and married his partner, Schmalz could have faced discharge under "Don't Ask, Don't Tell," risking the loss of his military career, retirement, and other benefits.<sup>54</sup>

It was only once Schmalz was out of the military that he could he truly be himself. Interestingly, it was at Schmalz's formal retirement ceremony, a month after his marriage to Pollock, where he was able comfortably to be out to his fellow service members. A former colleague asked Schmalz to bring Pollock along to the ceremony. For Schmalz, this was a first, since previous formal military functions had always been a lonely time for him. The invitation by his former colleague warmed Schmalz because it indicated two important points: The colleague did not care that Schmalz was gay, and he saw Pollock's service

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50. This trend is strong but not unanimous. See, e.g., *Nat'l Pride at Work v. Gov. of Mich.*, No. 265870, 2007 Mich. App. LEXIS 240 (Mich. Ct. App., Feb. 1, 2007) (holding that the Michigan "Marriage Amendment," MICH. CONST. art. I, § 25, prohibits public employers from entering into contractual agreements with their employees to provide domestic partner benefits or voluntarily providing domestic partner benefits).

51. *Lanier v. Traub*, 934 F.2d 287, 289 (1991).

52. See *Shaff v. United States*, 695 F.2d 1138 (9th Cir. 1983); *Long v. West*, 2000 U.S. App. Vet. Claims LEXIS 41 (Vet. App. 2000); *Funches v. United States*, 1992 U.S. Dist. LEXIS 5486 (N.D. Ill. 1992).

53. Interview by Rebecca Sawyer with Jeffrey Schmalz by telephone (June 30, 2006) (alteration added).

54. See *supra* note 6 and accompanying text.

as a military spouse as on par with the service and support of any other heterosexual spouse. During the retirement ceremony, Pollock was honored as any other military spouse might be honored for their support and commitment to the retiring military member. While Schmalz says he loved serving his country, he says this of “Don’t Ask, Don’t Tell”: “I’m not sure if it’s right for one’s overall emotional health because you are hiding, keeping secrets from people. Each day when you have to hide an integral part of yourself, it is retarding your relationships [with your co-workers].”<sup>55</sup>

Army Lieutenant Colonel Peggy Laneri was also impacted by the legalization of same-sex marriages in Massachusetts. An engineering officer and a graduate of the United States Military Academy (a member of the fourth class at West Point to include women), Laneri ultimately chose to retire earlier than anticipated because of “Don’t Ask, Don’t Tell” and its implications for her family. When Massachusetts recognized same-sex marriage, she and her partner, Beth, married. For them, the emotional and legal benefits of marriage outweighed the risk of discharge. Laneri says she was “tired of feeling constrained by an unjust policy and [felt she] had to do this.”<sup>56</sup> Additionally, many civilian companies in Massachusetts have begun to discontinue domestic partner benefits and to require that same-sex couples marry in order to receive company benefits. Said Laneri, “[i]f my partner didn’t have benefits, [we wouldn’t have any benefits] as my family wouldn’t be eligible for TRICARE.”<sup>57</sup> Although Laneri decided to list Beth as a beneficiary of her SGLI, it was not without fear. In her words, “[e]very time I filled out the form, I felt threatened.”<sup>58</sup> In the end, however, lack of military benefits for the couple’s daughter prompted Laneri to put in her retirement request (we will return to another aspect of Laneri’s case in the section on adoption).

For Schmalz and Laneri, “Don’t Ask, Don’t Tell” forced a choice between their military career and their family. Both lived in a state where same-sex couples were legally able to marry, yet both had to abide by the federal “Don’t Ask, Don’t Tell” law prohibiting “marriage or attempted marriage” to someone of the same sex in order to keep their military careers. For both members of the military, the very public statement of their respective marriages could have led to discharge under the gay ban.

By extension, that same law has denied their families a host of benefits including health insurance, survivor benefits, and housing and pay benefits. While Laneri was able to designate her partner as a primary beneficiary on her SGLI, the designation of a non-relative raised eyebrows and could have led to additional scrutiny. Additionally, under SBP, if a gay service member had

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55. *Id.* (alteration added).

56. Interview by Rebecca Sawyer with Peggy Laneri by telephone (June 21, 2006).

57. *Id.* (alteration added).

58. *Id.* (alteration added). In June 2006, Laneri stated, “If one’s primary beneficiary for SGLI is not a blood relative, then one must sign an extra form, or short note that your unit types up, acknowledging that you are designating a non-relative as your primary beneficiary. There were times when at least three enlisted people were involved in this simple transaction, and I have no doubt that each of them could have had a ‘seed’ planted—i.e. ‘Why is MAJ or LTC Laneri not leaving the money to her sister, who is identified as [the] next of kin, on the same form? [I] wonder who Elizabeth is?’” *Id.* (alteration added).

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previously married someone of the opposite sex, and they were legally separated but not yet divorced, the designation of a same-sex partner as the primary beneficiary would be void; the opposite-sex spouse would receive the SBP benefits over the same-sex partner, who could only be designated as having an insurable interest. Under SBP,

An unmarried retiree who has no dependent children may designate as a beneficiary a natural person with an insurable interest in the retiree, 10 U.S.C. § 1448(b), but that beneficiary will only be paid the annuity if there is no eligible spouse or child upon the retiree's death. 10 U.S.C. § 1450(a)(4).<sup>59</sup>

Housing benefits are also at risk. In a September 2005 SLDN blog entry regarding news that the British military would allow same-sex couples on-base housing, Schmalz wrote,

"My housing expense equaled my straight peers, yet only those that were married received a supplement to their pay when we went on active duty several times a year. My check was always less; especially obvious when those that shared my rank and years of service would compare their paychecks with mine."<sup>60</sup>

In a practical sense, due to "Don't Ask, Don't Tell," both Schmalz and Laneri were considered unattached soldiers without any dependents. "Don't Ask, Don't Tell" not only forces a cloak of silence on individual gay military members, but it also impacts their partners, their children, and their pocketbooks.

## VI. CREATING A FAMILY: THE LEGAL LANDSCAPE

Service members in same-sex relationships who decide to have or adopt children, face similar hurdles, both with respect to accessing benefits and with respect to career risks, as those outlined above. Innovations in reproductive technology and movement by a growing number of states to allow gay adults to adopt children have changed the landscape of family structure in our country. More and more states are recognizing the legality of parental relationships within the context of same-sex relationships.<sup>61</sup> This primarily occurs in cases of joint, non-biological adoption, and in second-parent adoption cases. Furthermore, women who are not involved in opposite-sex relationships are using medical technology to become pregnant and bear children.<sup>62</sup> Just like gay

59. Shaff v. United States, 695 F.2d 1138, 1141 n.3 (9th Cir. 1983).

60. Posting of Jeffrey P. Schmalz to SLDN Frontlines blog, <http://freedomtoserve.blogspot.com/2005/09/permanent-second-class-citizens.html> (Sept. 19, 2005, 12:43 EST).

61. In re Petition of K.M., 274 Ill. App. 3d 189 (Ill. App. Ct. 1995) (holding that same-sex couples have standing to file jointly for adoption); CAL. FAM. CODE § 9000(b) ("A domestic partner . . . desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.").

62. See Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES (Magazine), Mar. 19, 2006, <http://www.nytimes.com/2006/03/19/magazine/319dad.html?ex=1300424400&en=d0ee77de0912b2e6&ei=5088&partner=rssnyt&emc=rss>; Jenn Shreve, *The Gay-by Boom: Gay Couples no Longer Immune from Feeling the Pressure to Procreate*, SFGATE.COM, Sept. 28, 2004, <http://www.sfgate.com/cgi-bin/article.cgi?f=/g/archive/2004/09/28/gaybyboom.DTL>.

civilians, gay service members are seeking to use these trends and innovations to fulfill their dreams of having and raising children. However, introducing children into a same-sex relationship setting can drastically raise the risk that a gay service member's sexual orientation will be discovered and the service member will be fired.

An understanding of how states are recognizing and legalizing adoption by same-sex couples is helpful in order to explore these issues more deeply. For decades, lesbians, gays, and bisexuals have been allowed to adopt children, usually as single, qualified adults.<sup>63</sup> While there remains some general anxiety over single gay adults adopting, much of the tension in this area has now shifted to second-parent and joint adoption within the context of same-sex relationships.

Generally speaking, court decisions concerning children and their status within a family are inextricably linked to an analysis of what is in the best interest of the child. Over the last several decades, relevant case law in this area has developed in a manner recognizing that second-parent adoption within same-sex relationships is in the best interest of the child. Many of the courts looking at cases of second-parent adoption come to this conclusion due to the complications of conferring benefits without such adoptions. In the case of *In Re Hart*, a Delaware family court noted that interpreting the state adoption statute to allow second-parent adoptions "would serve the best interest of a child in many important ways, [including the] right to Social Security benefits," as well as other benefits such as life and health insurance.<sup>64</sup> Similarly, courts in Hawaii, Indiana, California, and the District of Columbia have discussed the proposition that allowing second-parent adoptions in order to make benefits accessible to adoptive children is in the best interest of those children.<sup>65</sup>

While civilian courts have progressively recognized that second-parent and joint adoptions are in the best interest of the child in order to open access to benefits, this is not necessarily the case for issues surrounding military benefits. Courts having jurisdiction over questions concerning benefits for the children of service members remain steadfast in adhering to fairly strict requirements to prove legal dependency before conveying benefits.<sup>66</sup> Most courts looking at these issues have only viewed them in the context of veterans benefits; however, their treatment of those benefits is a clear window into how access to similar benefits

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63. See Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts*, in *CREATING CHANGE, SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 305, 334 (John D'Emilio et al. eds., 2000); Susan J. Becker, *Many Are Chilled, but Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U.J. GENDER SOC. POL'Y & L. 177, 182-84 (2006). See also Human Rights Campaign, *Adoption Laws: State By State*, [http://www.hrc.org/Template.cfm?Section=Laws\\_Legal\\_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=19984](http://www.hrc.org/Template.cfm?Section=Laws_Legal_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=19984) (providing the status of adoption laws related to homosexuals for every state) (last visited Mar. 17, 2007).

64. 806 A.2d 1179, 1186 (Del. Fam. Ct. 2001).

65. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 03, 1996); *In re Adoption of Infant K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995).

66. See *Cruz v. Principi*, 2004 U.S. App. Vet. Claims LEXIS 305 (2004); *Bosley v. Principi*, 18 Vet. App. 12 (2001); *McColley v. West*, 13 Vet. App. 553 (2000).

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for the children of current service members may be judged. Generally, these courts appear to be consistently upholding the concept that the government is not obligated to provide dependent benefits to children whom service members have not formally adopted or established a legal relationship.

Dependent benefit cases in the military context focus primarily on issues concerning adoption and illegitimacy. Under either circumstance, the courts lean heavily toward ensuring that the relationship between service member and child is legally established before benefits will be conferred. In *Cruz v. Principi*, the Court of Appeals for Veterans Claims ruled that a child must be legally adopted by the service member or veteran, and rejected theories of dependency and “unofficial adoption,” in order to be eligible to obtain VA benefits.<sup>67</sup> Other decisions by the Veterans Appeals court have denied dependent benefits in cases where the adoption process was not completed prior to the attempt to access benefits, and in cases where the families have provided sworn statements attesting to the adoption but did not provide official birth certificate and adoption documentation.<sup>68</sup> The federal court in *Prudential Insurance Co. of America v. Moorhead* upheld a statutory limitation stating that the only illegitimate children who are eligible for SGLI benefits are those who have taken appropriate action to legally establish the relationship during the insured father’s lifetime.<sup>69</sup>

## VII. AND BABY MAKES THREE: PERSONAL STORIES

For Army Lt. Col. Peggy Laneri and her partner Beth, the decision to adopt a child prompted a serious evaluation of the military as Laneri’s choice of a career. Their daughter would never be known to the Army because Laneri knew that enrolling the child in DEERS could reveal her sexual orientation to her command. Any suspicions the military might have had about her sexual orientation would be confirmed because both she and Beth would be listed as their daughter’s parents in the adoption paperwork.

Despite not being able to access the full range of military benefits for her family, Laneri continued to serve with honor and distinction. At the onset of Operations Enduring Freedom and Iraqi Freedom, half of Laneri’s unit deployed in support of the war. Laneri remained stateside, training and teaching other officers. In 2005, Laneri decided she “could not enjoy the rewards of service at the expense of [her] family,” and realized that if she deployed and died, no one would notify her partner and daughter about her death, and her daughter would be left without any of Laneri’s surviving military benefits. After waiting ten months to provide her unit time to adjust to new leadership and to participate in their annual training, Laneri retired in the summer of 2005. She had served in the Army for twenty-two years.

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67. 2004 U.S. App. Vet. Claims LEXIS 305 (2004).

68. See *Bosley v. Principi*, 18 Vet. App. 12 (2001); *McColley v. West*, 13 Vet. App. 553 (2000); *Mata v. Brown*, 8 Vet. App. 485 (1996) (denying benefits to veteran’s adopted children in the Philippines—despite sworn statements from the school, etc—because the adoption decree did not strictly conform to the standards of Philippine adoption law).

69. 916 F.2d 261 (5th Cir. 1990).

The four children of Air Force Major Scott Hines,<sup>70</sup> an intelligence officer and Air Force Academy graduate, have all received different treatment by the military. Shiloh and Eden, Hines' biological children from a previous marriage to a woman, were recognized by the military as his dependents. Much like Laneri, Hines could not enroll his other two children, Louis and Sage, who he jointly adopted with his partner of six years, in DEERS without fear of dismissal under "Don't Ask, Don't Tell." Even after his divorce in 1999, Hines' biological children were issued military identification cards, allowing them access to medical care on base, among other benefits.<sup>71</sup> His adopted children could never have such a privilege. Other benefits, like on-base housing, could never become available to Hines and his family because of "Don't Ask, Don't Tell." Like Laneri, Hines was aware that if anything should happen to him in the line of duty, his partner and their two adopted children would have nothing.

Not only did the lack of health and life insurance and other tangible benefits impact the Hines family, "Don't Ask, Don't Tell" took an emotional toll on them as well. Hines attended many unit picnics alone, without his partner or his children. Hines notes that he was raising his children to be honest, but "'Don't Ask, Don't Tell' forced [his] entire family to be dishonest."<sup>72</sup> In the end, Hines chose to end his decade-long Air Force career in 2005 because he felt "Don't Ask, Don't Tell" was not fair to his partner and children. Their lives today contrast sharply with their lives while Hines was in the military. Hines' current civilian employer provides domestic partner benefits, thus ensuring the welfare of every member of his family. Hines and his partner have legally challenged laws banning same-sex marriage in Tennessee and are also involved in foster care advocacy. Says Hines, "We're probably overtly out [now] because we were in the closet [as a family] when I was in the military."<sup>73</sup>

For both Scott Hines and Peggy Laneri, the military's recognition of their children as their dependents presented a risk to their career. On the one hand, both Hines and Laneri were required by regulation to notify the military that they have dependents. Yet to do so was to risk discharge under "Don't Ask, Don't Tell." For a gay service member perceived to be single by the military, having a child raises eyebrows and risks. For those who adopt, particularly for those who adopt jointly, adoption forms listing two same-sex parents could be considered evidence of the service member's sexual orientation. With the adoption paperwork clearly listing two parents of the same sex, both Hines and Laneri risked making a statement to the military about their respective sexual orientations had they enrolled their children in DEERS. Instead, both families had to rely on the non-military member's employer for their children's health care and other benefits. In the end, the armed services lost two highly qualified and skilled officers to the civilian sector because the services could not, essentially, compete with the benefits and relationship recognition provided by many companies in the private and public sectors.

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70. Interview by Rebecca Sawyer with Scott Hines by telephone (June 26, 2006).

71. A military ID card is used to control access to military bases, medical facilities, stores and commissaries, recreation facilities, and high-security areas.

72. Interview by Rebecca Sawyer with Scott Hines, *supra* note 70.

73. *Id.* (alterations added).



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## VIII. MOVEMENT TO CHANGE “DON’T ASK, DON’T TELL”

As long as “Don’t Ask, Don’t Tell” remains public policy, these tensions between duty and family will continue to exist, eroding troop morale, diminishing troop levels, and consequently readiness.

There is a movement underway to end, through legislation and litigation, the ban on gays in the military. In 2005, Rep. Marty Meehan, D-Mass., introduced the Military Readiness Enhancement Act of 2006, legislation that would repeal the “Don’t Ask, Don’t Tell” law and replace it with a policy of nondiscrimination.<sup>74</sup> That same legislation was reintroduced in the House of Representatives in February 2007;<sup>75</sup> a companion Senate bill is expected to be introduced later in 2007.<sup>76</sup>

Legal challenges to “Don’t Ask, Don’t Tell” have not directly addressed many of the issues touched upon in this article. Early cases in the mid-1990s challenging the constitutionality of “Don’t Ask, Don’t Tell” did not fare well.<sup>77</sup> The legal landscape leading to those decisions has since changed. Most significantly, the 2003 Supreme Court decision in *Lawrence v. Texas* held that gay people enjoy “just as heterosexual persons do” the right to personal autonomy in intimate matters, such as the right to enter into same-sex relationships without government intrusion.<sup>78</sup> This decision explicitly overruled the 1986 case *Bowers v. Hardwick*,<sup>79</sup> upon which many of the early decisions upholding “Don’t Ask, Don’t Tell” were based.<sup>80</sup> In light of this changing landscape, three new challenges to “Don’t Ask, Don’t Tell” have been filed.<sup>81</sup> Each case seeks to

74. See Military Readiness Enhancement Act of 2006, H.R. 1059, 109th Cong., 1st Sess. (March 2, 2005) available at [http://frwebgate.accessgpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=fh1059ih.txt.pdf](http://frwebgate.accessgpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=fh1059ih.txt.pdf) (last visited Feb. 28, 2007).

75. Military Readiness Enhancement Act of 2007, H.R. 1246, 110th Cong., 1st Sess. (Feb. 28, 2007).

76. See Debra Rosenberg, *The Military: A Renewed War Over “Don’t Ask, Don’t Tell,”* NEWSWEEK, Nov. 27, 2006, at 8; Rick Klein, *Meehan Targeting “Don’t Ask, Don’t Tell,”* BOSTON GLOBE, Nov. 18, 2006, at A1.

77. See *Able v. United States (Able II)*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); *Philips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Able v. United States (Able I)*, 88 F.3d 1280 (2d Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996). See also *Hoffman v. United States*, 1997 WL 136418 (E.D. Pa. Mar. 24, 1997) (upholding 10 U.S.C. § 654), *aff’d*, 124 F.3d 187 (3d Cir. 1997) (mem.).

78. *Lawrence v. Texas*, 539 U.S. at 567 (2003).

79. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence*, 539 U.S. at 578 (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

80. See, e.g., *Holmes*, 124 F.3d at 1136 (9th Cir. 1997) (rejecting substantive due process argument because, under *Schowengerdt v. United States*, 944 F.2d 483 (9th Cir. 1991), any “substantive due process claim . . . was foreclosed by *Bowers*”); *Richenberg v. Perry*, 909 F. Supp. 1303, 1313 (D. Neb. 1995) (rejecting right of privacy claim based on *Schowengerdt* and other cases relying on *Bowers*), *aff’d*, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); *Philips*, 106 F.3d at 1426 & n.11 (holding that *Bowers* forecloses “heightened scrutiny” of “government regulation of homosexual conduct”).

81. *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006), *appeal docketed sub. nom.*, *Cook v. Gates*, No. 06-2313 (1st Cir. Sept. 13, 2006); *Witt v. U.S. Dep’t of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006); *Log Cabin Republicans v. United States*, No. CV04-8425 (C.D. Cal. filed Oct. 12, 2004). In November 2005, a United States Court of Federal Claims judge ruled in favor of granting

challenge the constitutionality of the law, though none have yet had an opportunity to explore the issues addressed in this article. Despite DOMA's existence, the tensions service members face concerning legal recognition of their relationships and families could arise in any of these cases should they proceed past a motion to dismiss.

Until the "Don't Ask, Don't Tell" law is repealed, it will continue to present a significant emotional impact on the lives of gay service members and their families. For these families, there will continue to be a tension between the service members' selfless service to their nation and the desire to gain recognition of and benefits for their partners and children. In order to preserve their military careers, gay service members must constantly conceal the truth about their personal lives when asked by co-workers and friends. Normally joyous occasions are marred by the looming threat of discharge under "Don't Ask, Don't Tell." Marrying someone of the same sex—or seeking legal recognition through civil unions or domestic partnerships—amounts to a statement of sexual orientation. Having children—biologically and through adoption—with a same-sex partner also amounts to a statement of sexual orientation. The security of knowing their family will be provided for in the event of an untimely death is missing for gay service members; they cannot designate their families for insurance survivor benefits without facing additional scrutiny into their personal lives. On a day-to-day basis, gay service members contend with the fears and the worries that providing and caring for their families will result in the end of their military careers. Yet, these are only a few of the numerous emotional challenges gay service members face under "Don't Ask, Don't Tell."

If "Don't Ask, Don't Tell" presents such an emotional challenge for the gay service member, one can only imagine how it affects morale—the morale of both the individual service member and of entire units. If "Don't Ask, Don't Tell" is viewed as a workplace issue, the reality that arises is the gay military ban undermines the kind of work environment most conducive to solid performance. After all, how can gay service members who are constantly under threat of losing their jobs be expected to perform at their optimum level? This is especially true when one recognizes that lying and deception fully contradict the service core values that service members are sworn to uphold: honor, duty, and integrity.<sup>82</sup> The strain of having to violate daily those personal and service values can be unbearable.

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Lt. Col. Steve Loomis the retirement payments denied to him after he was discharged under "Don't Ask, Don't Tell" while, at the same time, upholding "Don't Ask, Don't Tell." See *Loomis v. United States*, 2006 U.S. Claims LEXIS 394 (Fed. Cl. 2006).

82. Each Service has "values" or "core values." The Air Force advocates "integrity first, service before self, and excellence in all we do." Dep't of the Air Force, *Core Values*, in *THE LITTLE BLUE BOOK* (Jan. 1, 1997), available at <http://www.e-publishing.af.mil/pubs/US%20Core%20Values.pdf>. The Army promotes "loyalty, duty, respect, selfless service, honor, integrity, and personal courage." Dep't of the Army, *Living the Army Values*, [http://www.goarmy.com/life/living\\_the\\_army\\_values.jsp?fl=true](http://www.goarmy.com/life/living_the_army_values.jsp?fl=true) (last visited March 18, 2007). The Navy and Marine Corps stress "honor, courage, and commitment." Dep't of the Navy, *Personal Development: Honor, Courage, and Commitment*, <http://www.navy.com/about/during/personaldevelopment/honor/> (last visited March 18, 2007).

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Similarly, “Don’t Ask, Don’t Tell” is disruptive for unit cohesion in a number of significant ways. First, gay service members never feel safe enough to discuss personal matters with fellow co-workers, creating a barrier toward camaraderie. When these service members clearly evade answering simple, everyday questions, their co-workers may begin to doubt that they can trust these service members in more complicated, life-threatening situations. Furthermore, when gay service members are dismissed or choose to resign because of “Don’t Ask, Don’t Tell,” their units must then contend not only with the sudden loss of a fellow service member, but also with the burden of parceling out that individual’s duties until a qualified and skilled replacement can be found. The impact of this sudden loss is exponentially greater than just that calculated from the more than 11,000 service members discharged under “Don’t Ask, Don’t Tell” at this point in time.<sup>83</sup> The impact of “Don’t Ask, Don’t Tell” thus reaches far beyond just lesbian, gay, and bisexual service members; it is a detriment to the entire military.

“Don’t Ask, Don’t Tell” has impacted hundreds of thousands of lives, from the individual gay service member, to the company commander required to move forward with “Don’t Ask, Don’t Tell” discharge proceedings, to the partners and children of gay service members. The law forces a second-class citizenship upon the 65,000 lesbian, gay, and bisexual military personnel currently in our nation’s service. For those 65,000 gay service members, “Don’t Ask, Don’t Tell” denies recognition and protection to their families unless they are willing to gamble with their careers. This is a detrimental law that has cost our nation far too much in terms of talent and skills.

## CONCLUSION

Repeal of “Don’t Ask, Don’t Tell”—whether through litigation or legislation—does not address all of the issues presented in this Article. Following repeal of “Don’t Ask, Don’t Tell,” the military will need to address how the families of gay service members will be provided for and recognized. Until then, our national security and the strength of our armed forces will remain imperiled by the military’s discharge of highly skilled and competent gay service members.

The most visual change we anticipate will follow the repeal of “Don’t Ask, Don’t Tell” is that gay service members and their families will be empowered to participate in the homecoming ritual. Gay service members, their partners, and children will be allowed to express publicly the joy of a family reunited. Let us finally salute the service of our nation’s lesbian, gay, and bisexual patriots. Let us truly welcome them home.

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83. See Press Release, Servicemembers Legal Defense Network, Military Discharges Two Service Members Per Day For Being Gay, Despite On-Going War and Recruiting & Retention Woes (May 24, 2006), available at <http://www.sldn.org/templates/press/record.html?section=2&record=2979>; FRANK J. BARRETT, ET AL., THE PALM CENTER, FINANCIAL ANALYSIS OF “DON’T ASK, DON’T TELL:” HOW MUCH DOES THE GAY BAN COST? (Feb. 2006), available at <http://www.palmcenter.org/files/active/0/2006-FebBlueRibbonFinalRpt.pdf>.